APPENDIX

APPENDIX A.

RULING ON MOTION FOR SUMMARY JUDGMENT.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

SHELL OIL COMPANY,
Plaintiff,
vs.
EMOGENE SNYDER PRESCOTT,
Defendant.

Civil Action.
No. C-66-233.

In this cause, on February 3, 1967, before the Honorable Robert M. McRae, Judge, presiding, the Court, after hearing arguments of counsel on motion for summary judgment, announced the following ruling, to-wit:

The Court: As I indicated earlier, the Court has had the benefit of very thorough briefs before the motion was heard orally. The factual situation has been very clearly simplified. The Court has listened to the argument of the attorneys and is willing, if called upon, to more formally reduce the opinion of the Court to writing.

The Court is of the opinion that the judgment should be for the plaintiff, based upon the wording of Paragraph 14 of the lease.

Now, I don't mind saying that this was a surprise to the Court. The first time I read the lease, I thought it was a mutual provision, but when you read the Paragraph 14 carefully it is inescapable in my opinion that you cannot do anything other than limit that option to offers which are lower than the thirty-two thousand five hundred dollar option. I might say that this decision is not

in accordance with my sympathies; but I can't find any overreaching, and we don't decide our cases on sympathy.

I don't see any cause for damages since it has been a relatively short time.

I will say this, that if the case is going to be appealed, then possibly we will have to have some sort of a hearing on damages. I have never granted specific performance before, and I know some title matters have to be reckoned with, although I see somebody has already bought some title work in this case. I would suggest that you gentlemen confer in the light of the Court having cast its lot with the plaintiff and see if there is going to be a problem. If it is going to be more than thirty days or so, the Court would entertain some further application from either side about more specific relief and possibly some measure of damages. The Court would like the attorneys to prepare an order in the case.

Mr. Regan: Thank you, Your Honor.

Mr. Nicholson: Thank you, Your honor.

APPENDIX B.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee,
Western Division.

SHELL OIL COMPANY,
Plaintiff,
vs.
EMMOGENE SNYDER PRESCOTT,
Defendant.

No. 66-233.
Civil.

OPINION—FILED MARCH 23, 1967.

On February 3, 1967, the Court, by oral opinion, granted a Motion for Summary Judgment for the plaintiff in this suit wherein the plaintiff seeks specific performance for the purchase of real estate pursuant to an option to purchase said property in a lease agreement between the parties. The matter is presently before the Court on the plaintiff's Motion for Supplemental Relief, including an award of damages. The plaintiff asserts that the defendant through her attorney has indicated that the ruling of this Court granting specific performance will be appealed, and the attorney for the defendant confirmed this intention at the hearing of the Motion for Supplemental Relief.

It is the opinion of the Court that the plaintiff in this cause should have a final judgment requiring the defendant to convey to the plaintiff the property in question for the purchase price of $32,500.00, which sum was heretofore paid into court on August 12, 1966. The order should further provide that the Clerk shall deliver the sum heretofore tendered to the attorney for the plaintiff and the

attorney for the defendant for the purpose of depositing the funds under such circumstances as may be agreed upon by the respective attorneys, to the end that the funds shall earn income. The plaintiff, being presently in possession of the premises, shall continue in possession and shall discontinue paying any rent to the defendant. Until the deed is delivered, the defendant shall pay all taxes and insurance and shall be entitled to reimbursement from the plaintiff for all sums paid within thirty days after written evidence of the payment is furnished to the plaintiff. Upon delivery of the deed by the defendant to the plaintiff and upon receipt of the purchase price, the defendant shall also be entitled to the income actually earned upon the amount tendered and subsequently withdrawn.

In the event the defendant shall prevail on appeal, the purchase price and all income therefrom shall be returned to the plaintiff and, the defendant shall reimburse the plaintiff for the total sums paid on taxes and insurance. The amount of rent to which the defendant will be entitled in the event she shall prevail on appeal is reserved for future determination.

The discontinuance of payment of rent is retroactive to February 3, 1967, the date of the decision of the Court. All insurance and taxes shall be prorated between the parties as of that date. All other claims for damages and further supplemental relief by the plaintiff are disallowed.

ROBERT M. McRAE,
United States District Judge.

Enter
3-23-67.

APPENDIX C.

FINAL JUDGMENT—FILED APRIL 4, 1967.

This cause came on to be heard upon the Complaint of Shell Oil Company, the Answer of Emmogene Snyder Prescott, the Amendment to Answer, the respective Motions for Summary Judgment filed by each of said parties, the Stipulation entered into by said parties, through their counsel, upon argument of counsel in support of their respective Motions for Summary Judgment, and upon the entire record in the cause.

From all of the above, the Court is of the opinion and does hold that plaintiff, Shell Oil Company, is entitled to specific performance as prayed for in the Complaint, inasmuch as during the term of the subject lease as extended it gave to defendant notice of its exercise of the option to purchase the subject property for the sum of $32,500.00, as provided in Article Thirteenth of the subject lease, which is Exhibit A to the Complaint. The Court holds that under the terms of said lease, plaintiff is entitled to said relief notwithstanding the fact that prior to the time that plaintiff notified defendant of its exercise of its option as aforesaid, defendant notified plaintiff that she had received from other parties a bona fide offer to purchase the subject property for the sum of $50,000.00 and furnished an affidavit that said offer was a bona fide offer, all pursuant to Article Fourteenth of the aforesaid lease.

It Is, Therefore, Ordered, Adjudged and Decreed that defendant, Emmogene Snyder Prescott, convey to plaintiff, Shell Oil Company, the premises which are described in the aforesaid lease with all appurtenances, improvements and equipment, and lessor's fixtures and personal property thereon, for the sum of $32,500.00, pursuant to the terms of the aforesaid lease, which is Exhibit A to the Complaint.

This cause further came on to be heard upon plaintiff's Motion for Supplementary Relief founded upon the prayer contained in the Complaint for "such further and other relief, including an award of damages as the facts will justify." From the Stipulation of the parties filed herein on February 2, 1967, and from statements of counsel made in open Court, it appears that notwithstanding the fact that the subject lease expired according to its terms on April 14, 1966, defendant has continued to pay to plaintiff the monthly rental of $250.00 prescribed in the subject lease. Upon this phase of the matter,

It Is Ordered, Adjudged and Decreed as follows:

The plaintiff, being presently in possession of the premises, shall continue in possession and shall discontinue paying any rent to the defendant. Until the deed is delivered, the defendant shall pay all taxes and insurance and shall be entitled to reimbursement from the plaintiff for all sums paid within thirty days after written evidence of the payment is furnished to the plaintiff. Upon delivery of the deed by the defendant to the plaintiff and upon receipt of the purchase price, the defendant shall also be entitled to the income actually earned upon the amount tendered and subsequently withdrawn by consent and for investment under the joint control of the attorneys for both parties.

In the event the defendant shall prevail on appeal, the purchase price and all actual income therefrom shall be returned to the plaintiff, and the defendant shall reimburse the plaintiff for the total sums paid on taxes and insurance. The amount of rent to which the defendant will be entitled in the event she shall prevail on appeal is reserved for future determination.

The discontinuance of payment of rent is retroactive to February 3, 1967, the date of the decision of the Court.

APPENDIX D.

NOTICE OF APPEAL.

All insurance and taxes shall be prorated between the parties as of that date. All other claims for damages and further supplemental relief by the plaintiff are disallowed.

To all of which defendant duly excepts.

This 3 day of April, 1967.

ROBERT M. McRAE, JR.,
United States District Judge.

APPENDIX E.

No. 17917.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

SHELL OIL COMPANY,
Plaintiff-Appellee,
v.
EMMOGENE SNYDER PRESCOTT,
Defendant-Appellant.

On Appeal from United States District Court for the Western District of Tennessee, Western Division.

Decided July 23, 1968.

Before O'Sullivan and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

Peck, Circuit Judge. The Shell Oil Company (hereinafter "Shell") sought specific performance of its alleged right to purchase for $32,500 the premises leased by it from appellant, Mrs. Prescott, under a purchase option contained in the lease. The District Court granted Shell's cross motion for summary judgment and this appeal followed.

The material facts in this case were stipulated by the parties and are not in dispute. Appellant was the lessor in a written lease agreement with Shell, the pertinent provisions of which are set forth below:

> "Thirteenth. At any time during the term of this lease or any extension or renewal, Shell shall have the

option to purchase the leased premises, with all appurtenances, improvements and equipment and Lessor's fixtures and personal property thereon, for the sum of Thirty Two Thousand Five Hundred Dollars ($32,500.00) exercisable by notice of Lessor.

"Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five days after Shell's receipt of the aforesaid notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created."

The following events occurred during the term of the lease. On March 18, 1966, appellant notified Shell that she had received a bona fide offer from a third party to purchase the property in suit for $50,000, and gave Shell the right to purchase at that price under the first refusal option contained in Article Fourteen. On April 4, 1966,

Shell notified appellant that it declined to exercise its option under Article Fourteen, but that it did elect to exercise its purchase, or fixed price, option under Article Thirteen to acquire the property for $32,500. When appellant disputed Shell's claim under Article Thirteen, this diversity action was commenced in the United States District Court for the Western District of Tennessee.

The issue presented here is one of construction. It is appellant's position that under the terms of the lease the party first exercising one of the dual options fixes the rights and liabilities of the other party. It is thus contended by appellant that while Shell had the absolute right to exercise its purchase option at any time prior to notification by her of receipt of a bona fide offer from a prospective purchaser which she intended to accept, when she gave such notice, Shell's right to purchase the property for $32,500 pursuant to the purchase option terminated.

It is Shell's contention that in addition to its right to possession of the property under the lease agreement, it had the right to purchase the property for $32,500 at any time within the term of the lease under the fixed price option, as well as the continuing right to buy the subject property pursuant to the first refusal option for an amount which, as a practical matter, would be equal to or less than the purchase option price.

Had the parties to this action desired, it is clear that they could have executed a dual option lease similar to the one under consideration whereunder the lessor had the power to terminate the purchase option at any time before its exercise by notifying the lessee of her intent to accept a bona fide offer and offering the lessee first refusal. See *Corbin, Contracts,* § 261 (1950), and cases cited *infra.* However, the lease in dispute is not susceptible to such construction, which would require the following

language appearing in Article Fourteen to be deemed surplusage and as without effect:

> "Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteen, have the prior option to purchase said premises. . . ."
>
> * * * * * * *
>
> "Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteen, or its right to the estate herein created."

Under applicable Tennessee law, as elsewhere, courts should, in ascertaining the intent of the parties to a contract, construe the contract as a whole and give effect to every part thereof. See *Edelen Transfer & Storage Co. v. Willis,* 16 Tenn. App. 99, 66 S. W. 2d 214 (1932); *City of Memphis v. Ford Motor Co.,* 304 F. 2d 845 (6th Cir. 1962). A corollary principle is that courts are not at liberty to make new contracts for the parties by adding or deleting provisions. See *McKee v. Continental Ins. Co.,* 191 Tenn. 413, 234 S. W. 2d 830 (1950); *Petty v. Sloan,* 197 Tenn. 630, 277 S. W. 2d 355 (1955).

In holding for Shell on the basis of the language in Article Fourteen, the District Court stated:

> "[W]hen you read Paragraph 14 carefully it is inescapable in my opinion that you cannot do anything other than limit that option to offers which are lower than the thirty-two thousand five hundred dollar option."

This was but another way of stating that Shell's right to exercise the purchase option was continuing and not terminable upon receipt of notice pursuant to the first refusal provision, and that in these circumstances, Shell would not likely pay more than $32,500 for the leased property, nor would a prospective purchaser likely offer more

than $32,500 for the premises with the purchase option outstanding. The District Court's construction finds ample support in the two provisions in question, and the court properly rejected appellant's argument that the parties to the lease could not have intended to "limit" the first refusal option to offers lower than $32,500. In this respect, it has been suggested in cases construing dual option leases somewhat similar to the one here that the first refusal option may be merely a device by which the lessor can induce an acceleration of the lessee's decision to purchase by affording an opportunity to purchase at a price more advantageous than that set forth in the purchase option. See *Butler v. Richardson,* 74 R. I. 344, 60 A. 2d 718 (1948); *Sinclair Refining Co. v. Clay,* 102 F. Supp. 732 (N. D. Ohio 1951), aff'd, 194 F. 2d 532 (1952); cf. *Sinclair Refining Co. v. Allbritton,* 147 Tex. 468, 218 S. W. 2d 185 (1949).

Appellant relies on the following cases involving dual option leases, all of which she contends support her position that lessee's rights under the purchase option terminate once an election is made not to purchase the leased premises when given the opportunity to do so on a first refusal basis. *Harding v. Gibbs,* 125 Ill. 85, 17 N. E. 60 (1888); *Manasse v. Ford,* 58 Cal. App. 312, 208 P. 354 (1922); *Adams v. Helburn,* 198 Ky. 546, 249 S. W. 543 (1923); *Shell Oil Co., Inc. v. Blumberg,* 154 F. 2d 251 (5th Cir. 1946); *Northwest Racing Ass'n v. Hunt,* 20 Ill. App. 2d 393, 156 N. E. 2d 285 (1959); *Texaco, Inc. v. Rogow,* 150 Conn. 401, 190 A. 2d 48 (1963). However, while so-called dual option lease agreements are often generally similar, because of variances in phrasing and circumstances of execution it is not often that a decision construing one contract will be dispositive of a case construing another. The prime and controlling distinction between the above cases and the instant case is found in the language of Article Fourteen preserving to Shell its rights to the pur-

chase option. In all of the above cases, there was either a basis for finding that the purchase option had been limited or qualified by the first refusal option, or nothing to indicate that the purchase option was not limited or qualified by the first refusal provision. That is not the case here. Shell's right under the fixed price option in Article Thirteen was not limited or modified in any manner by the subsequent Article giving to it the right of first refusal. On the contrary, by the specific terms of Article Fourteen, Shell's rights thereunder were "in addition and without prejudice to Shell's rights under Article Thirteen. . . ." Further, the failure to exercise the Article Fourteen option was, according to its explicit language, "in no way [to] affect . . . Shell's rights under Article Thirteen." Accordingly, it is here determined that judgment was properly entered for Shell, and the judgment should be affirmed.

Affirmed.

APPENDIX F.

UNITED STATES COURT OF APPEALS
for the Sixth Circuit.

SHELL OIL COMPANY,
Plaintiff-Appellee,
vs.
EMMOGENE SNYDER PRESCOTT,
Defendant-Appellant.
No. 17,917.

Before: O'Sullivan and Peck, Circuit Judges, and Cecil, Senior Circuit Judge.

JUDGMENT.

Appeal from the United States District Court for the Western District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendant-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

A True Copy.

Attest:

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Carl W. Reuss,
Clerk.

Issued as Mandate:

Costs: Awarded to Appellee

Filing fee .....$——
Printing appendix $148.65

Total $148.65